STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 9, 2007
v	No. 270116 Emmet Circuit Court
TRADVIS DEMARR WILLIAMS, Defendant-Appellant.	LC No. 05-002504-FH

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), maintaining a drug house, MCL 333.7405(1)(d), and possession of marijuana, MCL 333.7403(2)(d). Pursuant to MCL 769.11, he was sentenced as a third habitual offender to 34 months to 30 years in prison for the cocaine conviction, to be served consecutively to concurrent terms of one to three years for the drug house conviction and 251 days for the marijuana conviction. He appeals as of right. We affirm.

I

Defendant first argues that the trial court erred by failing to give a cautionary instruction concerning the use of drug dealer profile evidence.

Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). In this case, however, defendant did not request a cautionary instruction on drug dealer profile evidence. Accordingly, this issue is unpreserved and we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

Drug profile evidence is an informal collection of otherwise innocuous characteristics that are often displayed by those involved in the trafficking of drugs. *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). Profile evidence is inherently prejudicial because it suggests that innocent characteristics may be indicative of criminal activity. *Id*. at 53. Accordingly, "courts must make clear what is and what is not appropriate use of the profile evidence." *Id*. at 57. "Thus, it is usually regarded as necessary for the court to instruct the jury with regard to the proper and limited use of profile testimony." *Id*.

In the present case, the trial court did not instruct the jury concerning the permissible uses of drug profile evidence. But even if this omission constituted plain error, it did not affect defendant's substantial rights. The profile evidence was used only to explain why the police chose to follow the motel owner's tip and focused on defendant, and how the police used their observations to obtain a search warrant. It was not used to prove defendant's guilt.

Defendant correctly notes that in *United States v Lopez-Medina*, 461 F3d 724, 743-745 (CA 6, 2006), a federal court found that allowing federal agents to testify as experts concerning the significance of the evidence they found, without a cautionary instruction, was plain error that threatened the integrity and reputation of judicial proceedings, thereby requiring reversal. However, *Lopez-Medina* is distinguishable from this case. Unlike in *Lopez-Medina*, the trial court in this case issued a general cautionary instruction concerning the weight of expert testimony. The *Lopez-Medina* Court stated that such an instruction would have been sufficient to avoid reversal. *Id.* at 743-744. Additionally in the present case, unlike in *Lopez-Medina*, the witnesses who testified that defendant was selling drugs out of his motel room were different from the officers who simply saw many visitors coming and going, and who gave their expert opinions concerning drug trafficking in northern Michigan. See *id*. at 744-745. Thus, unlike in *Lopez-Medina*, the officers' testimony in the present case did not "lack[] any clear demarcation between expert and fact witness roles." See *id*. at 744. Defendant's reliance on *Lopez-Medina* is misplaced. Reversal is not warranted on the basis of this unpreserved issue.

II

Next, defendant argues that defense counsel was ineffective by failing to object to the trial court's undisputed accomplice instruction, and by failing to request cautionary instructions concerning the permissible uses of drug profile evidence and evidence of other bad acts. We disagree.

Because defendant failed to move for a *Ginther*[1] hearing or a new trial on the basis of ineffective assistance of counsel, our review of this issue is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question, i.e, that the error likely made a difference in the outcome of trial. *Id.* at 312-315; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

A. Undisputed Accomplice

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The trial court instructed the jury in accordance with CJI2d 5.4 (the definition of an undisputed accomplice) and CJI2d 5.6 (accomplice testimony). The instructions for CJI2d 5.4 state that it should be given automatically (1) where the witness has admitted his guilt of the offense, (2) where the witness has been convicted of the offense, or (3) where the evidence clearly shows complicity. By contrast, the instructions for CJI2d 5.5 (disputed accomplice) state that it should be given where the witness has not admitted taking part in the crime.

In the present case, Lorenzo Martinez explicitly admitted going to Taylor, Michigan, picking up a certain quantity of cocaine, and delivering it to defendant in defendant's motel room. Thus, Martinez admitted his guilt of the same crime as defendant, i.e., possession with intent to deliver cocaine. Because the undisputed accomplice instruction was appropriate, defense counsel was not ineffective for failing to object to it. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

B. Other Bad Acts

Evidence of other bad acts is admissible to prove "motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake . . . ." MRE 404(b)(1). That it may not be used to prove a person's character to show that the person acted in conformity with character on a particular occasion "does not preclude using the evidence for other relevant purposes." *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). But a cautionary instruction is sometimes appropriate. *Id.* at 56; *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

Whether to request a cautionary instruction is a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003). In this case, only a weak character inference arises from evidence that defendant had sold drugs in the past. By contrast, the evidence had strong probative value regarding defendant's intent, scheme, plan, and lack of mistake. Thus, defense counsel reasonably may have decided that a cautionary instruction would simply have drawn undue attention to the issue. Defendant has failed to overcome the presumption of sound trial strategy in this regard.

C. Drug Profile Evidence

As discussed previously, when drug dealer profile evidence is used, a cautionary instruction should generally be given. But even if defense counsel made a mistake by failing to request a cautionary instruction, for the reasons previously discussed, defendant was not prejudiced because there was strong evidence of defendant's guilt, the expert witnesses were not the same as the fact witnesses, and the trial court gave a general cautionary instruction concerning expert testimony.

D. Cumulative Effect

At best, defendant has shown that defense counsel erred by failing to request a cautionary instruction concerning the proper use of drug profile evidence. However, defendant was not prejudiced by that error. Because defendant's remaining claims of ineffective assistance lack merit, there was no cumulative effect of errors by counsel that deprived defendant of a fair trial.

See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998); *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984).

III

Next, defendant argues that counsel was ineffective for not filing a motion to suppress evidence resulting from defendant's allegedly illegal detention by police. We disagree.

The United States Supreme Court has held that officers executing a search warrant for contraband have the authority "to detain the occupants of the premises while a proper search is conducted." *Muehler v Mena*, 544 US 93, 98; 125 S Ct 1465; 161 L Ed 2d 299 (2005) (internal quotations omitted); see also *People v Zuccarini*, 172 Mich App 11, 13-14; 431 NW2d 446 (1988). "Such detentions are appropriate . . . because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial." *Muehler*, *supra* at 98. The goals are to prevent flight, to minimize the risk of harm to the officers, and to facilitate the orderly completion of the search. *Id*. Officers are also free to use reasonable force to effectuate this detention. *Id*. at 98-99. Therefore, occupants can be awakened, handcuffed, and detained in enclosed quarters for the duration of the search. *Id*. at 96, 98-100.

In the present case, defendant does not argue that there was a lack of probable cause to support the search warrant. Under *Muehler*, the police had a right to reasonably detain him during the search, including handcuffing him and holding him in a car. Because defendant's detention was lawful, there was no basis for counsel to move to suppress defendant's statements made during this detention, or the room key defendant deposited on the ground. Accordingly, defense counsel was not ineffective in this regard. See *Kulpinski*, *supra* at 27.

IV

Defendant argues that, but for judicial fact-finding in the scoring of the sentencing guidelines, he would have scored in an intermediate cell, and imposition of a prison sentence would have been precluded. Thus, defendant argues that the sentencing court violated *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

Defendant acknowledges that this argument was rejected in *People v McCuller*, 475 Mich 176, 180-183; 715 NW2d 798 (2006). However, he observes that the United States Supreme Court vacated our Supreme Court's decision in *McCuller* and remanded the case for reconsideration in light of *Cunningham v California*, 549 US ___; 127 S Ct 856; 166 L Ed 2d 856 (2007).[2] See *McCuller v Michigan*, ___ US ___; 127 S Ct 1247; 167 L Ed 2d 62 (2007).

[2] In *Cunningham*, a defendant convicted of child abuse was sentenced to an enhanced term of 16 years based on the sentencing court's finding of aggravating factors. *Cunningham*, *supra* at 860-861. The California sentencing scheme required that the defendant be sentenced to a fixed middle term of 12 years, absent a judicial finding of aggravating factors that, if present, mandated the imposition of a 16-year fixed term of imprisonment. *Id*. at 860. The United States Supreme Court held that this scheme violated the defendant's right to a jury trial by elevating a (continued…)

Our Supreme Court recently issued its decision in *McCuller*, on remand from the United States Supreme Court. The Court reaffirmed its prior decision, again concluding that Michigan's true indeterminate sentencing scheme does not violate *Blakely*. *People v McCuller*, 479 Mich 672, 676-678; ___ NW2d ___. In light of our Supreme Court's recent decision in *McCuller*, we reject this claim of sentencing error.

V

Finally, defendant argues that the trial court erred in scoring five points for offense variable OV 2. We disagree.

Under the legislative guidelines, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A sentencing factor must be proved only by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006); *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991).

Five points are to be scored for OV 2 if the offender possessed or used a knife. MCL 777.32(1)(d). A knife was found inside a small travel bag on the bathroom counter of defendant's motel room. We disagree with defendant's argument that there was no evidence that he possessed that knife.

It is well settled that possession may be actual or constructive, and that physical possession is not necessary. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Ownership of the item is also unnecessary. *Id*. at 520. Additionally, because possession can be joint, more than one person can have actual or constructive possession of an item at the same time. *Id*. "The essential question is whether defendant had dominion or control" over the item. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995); *Wolfe*, *supra* at 520-521.

Where there is no physical possession, mere presence at a location where the item is found, without more, is insufficient to prove constructive possession. *Wolfe*, *supra* at 520; *People v Vaughn*, 200 Mich App 32, 36; 504 NW2d 2 (1993). Rather, examining the totality of the circumstances, there must be some additional link or connection shown between the person and the item. *Id.* at 36. Constructive possession may be shown by either direct or circumstantial evidence and the reasonable inferences arising from that evidence. *Wolfe*, *supra* at 526.

In the present case, a knife was found inside a small travel bag on the bathroom counter of defendant's motel room. Several other people came in and out of the motel room. However, there was no evidence that the knife belonged to or was possessed by anyone other than defendant. There was also no evidence that anyone else was staying in the motel room with defendant. Martinez denied ownership of the contents of the travel bag, except for the box of

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(…continued)

defendant's *maximum* sentence solely on the basis of facts found by the court by a preponderance of the evidence, not facts reflected in the jury's verdict or admitted by the defendant. *Id*. at 868-871.

checks stolen from his home. Further, Martinez saw defendant using the scale that was kept in a cardboard box in the same travel bag as the knife. Defendant was convicted of possessing the marijuana and the cocaine found in the motel room. The evidence adequately supports the trial court's score of five points for OV 2.

Affirmed.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey